(4)

No. 98-1170

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

LEONARD PORTUONDO, Superintendent,
Fishkill Correctional Facility,

Petitioner,

—v.—

RAY AGARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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June 7, 1999

64pp

QUESTION PRESENTED

Whether the Second Circuit Court of Appeals erred in extending this Court's narrowly construed decision in *Griffin v. California* -- which prohibited comment or instruction implying that the defendant's exercise of his right to remain silent constitutes proof of guilt -- to a prosecutor's comment that a testifying defendant's opportunity to hear and use the testimony of other witnesses negatively affected his credibility?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 117 F.3d 696 (Oakes, J; Winters, J., concurring; Van Graafeiland, J., dissenting). The order of the Court of Appeals for the Second Circuit denying rehearing or rehearing in banc is reported at 159 F.3d 98 (Oakes, J.; Van Graafeiland, J., dissenting).

The memorandum decision of the United States District Court for the Southern District of New York (Raggi, J.) was delivered orally by the court and transcribed in minutes dated March 15, 1996. The unreported opinion, as transcribed, is reprinted in the appendix to the Petition for a Writ of Certiorari at pp. 1a-9a, and the order and judgment of the court are reprinted at pp. 10a-11a.

The decision of the New York State Court of Appeals denying the defendant's application for leave to appeal to that court from the decision of the Appellate Division, Second Department is reported at 83 N.Y.2d 868, 613 N.Y.S.2d 129 (1994). The decision of the Appellate Division, Second Department, modifying the judgment of conviction and, as modified, unanimously affirming the judgment is reported at 199 A.D.2d 401, 606 N.Y.S.2d 239 (2d Dept. 1993).

JURISDICTION

On July 3, 1997, the Second Circuit reversed a decision of the Eastern District denying a petition for a writ of *habeas corpus* and remanding the case to the district court, with directions to grant the petition. On October 23, 1998, the Court of Appeals for the Second Circuit denied a petition for rehearing and petition for rehearing in banc. The petition for certiorari

was timely filed on January 20, 1999, and this Court granted the petition on March 22, 1999. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V - Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI - Jury Trial for Crimes and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

The Trial

On the evening of April 27, 1990, Nessa Winder and her friend, Breda Keegan, twenty-three-year old women from Ireland, went to a nightclub in Manhattan. There, they first met the thirty-five-year old defendant, whom they identified in court (Record: 38,[1] 235).[2] The evening culminated in a consensual sexual encounter between Ms. Winder and the defendant that involved oral sodomy and vaginal intercourse. During that encounter, Ms. Winder rejected the defendant's demands for anal intercourse; also, the defendant showed her a gun and holster he kept in his apartment (Record: 38, 40-43, 48-50, 168-171, 235, 266).

The following week, at the defendant's urging, the two women met the defendant at a nightclub, where he was with his friend, Albert Kiah (Record: 65-69, 180-181, 241-244, 268). The four, accompanied by defendant's roommate, ultimately found themselves back at the defendant's apartment, where an intoxicated Winder fell asleep on the defendant's bed. When Keegan tried to leave with Winder, the defendant became verbally abusive, and threatened her with a gun into leaving the apartment with Kiah but without Winder (Record: 244-247, 249-252, 272-274).

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1. Numbers preceded by "Record" refer to pages of the trial transcript. Those preceded by "JA" refer to the Joint Appendix filed with this Court.

2. The presence of the defendant was also duly noted by the court clerk, who repeatedly announced, in the presence of the jury, the presence of all the parties (Record: 157, 292). The prosecutor also pointed and referred to the defendant during her opening statement (Record: 7, 20).

When Winder woke the next morning, she found herself wearing nothing but a vest and lying next to the defendant, who was wearing only his underwear. She could remember nothing after leaving the nightclub the night before (Record: 65-66, 68, 73, 75, 182-187, 220).

When the defendant awoke and she refused his demands for sex (Record: 75, 77), a violent encounter ensued. Over a period of time, the defendant battered her around the face and body, threatened to kill his physically smaller victim with his gun, and then repeatedly anally and orally sodomized her, and raped her (Record: 75-81, 86-99, 106, 223-224). The terrorized Winder did not move during the anal sodomy so that the act would be less painful (Record: 94-95, 223-224).

After threatening to kill her if she contacted the police, the defendant let Winder leave (Record: 99). She immediately contacted Keegan, who picked up the hysterical and visibly beaten Winder and drove her directly to the police precinct, and thereafter to the hospital where Winder was treated (Record: 101-102, 254-258).

The existence of Ms. Winder's facial and body injuries was substantiated by the testimony of Detective Philip Giardina (Record: 325-326), as well as by medical records and expert testimony (Record: 413, 421-423, 427). Photographs of Ms. Winder taken the day after the attack, as well as three weeks later, were introduced into evidence and demonstrated the extent of her injuries; her eye showed hemorrhages for four to five weeks afterwards (Record: 87-88, 106-107). Additionally, while no seminal fluid was found in the oral and anal samples taken from Ms. Winder, testing revealed the presence of spermatozoa in the samples of vaginal fluid (Record: 441-444,

452-457, 474-477). While there was no evidence of trauma in Ms. Winder's vagina or anus, it was established through expert testimony that the absence of trauma did not mean that a rape had not occurred, or connote the absence of force or pain during the act (Record: 411-417, 420, 422-425, 427, 428, 431-433). These conclusions were confirmed by an expert called by the defense, who also testified that the injuries to Ms. Winder's eye were fresh (Record: 602-604, 620-621, 634-635, 640, 648).

The following day, defendant left a telephone message for Winder on her answering machine and apologized for being a "golden asshole" and for the "entire situation." He wished that Winder would "live safefully [sic] and peacefully" (Record: 108-109, 158-160, 256-259, 264-265).

As a result of a search warrant executed at defendant's home, Detective Giardina recovered an operable .45 caliber automatic handgun, a holster, and two magazines containing shells. Ms. Winder identified the gun as appearing to be the gun used by the defendant (Record: 160). Defendant was arrested, and initially denied that he had a gun. He then stated that he had a toy gun, and then finally stated that he had a gun but that he was holding it for a friend (Record: 296, 306, 329-332, 341-342). The defendant also acknowledged that he had been involved in a fight with Winder and that, during that fight, she scratched him and he "mushed" her face. He admitted that they had had sex, but claimed it was consensual (Record: 329-332, 341-342).

The defendant, who sat through the testimony of all of the prosecution witnesses, testified on his own behalf, and essentially claimed that all sexual acts between he and Ms. Winder were consensual (Record: 650-652, 658, 668-672, 676-677, 705, 709-712, 719-726). He admitted calling Winder the

next day to apologize, but claimed that he was only apologizing for "mush[ing]" her face. According to the defendant, who claimed to be a trained martial artist, the complainant became "hyper" and violent that morning over concern about her boyfriend who was scheduled to visit from Ireland, and scratched him on the lip; he struck her during an attempt to calm her down. He admitted that he did not seek medical treatment for his scratch and attributed the absence of any scar to the fact that he was cut inside of his mouth (Record: 669-672, 694, 711-718, 721, 725-726). He also admitted possessing a weapon, but claimed that it was Ms. Winder who, during their first encounter, removed it from his closet and strapped it on when he momentarily left his bedroom to go to the bathroom (Record: 653, 676). He also denied threatening Keegan, a claim echoed by defense witness Albert Kiah (Record: 512-522, 524, 531-535). During cross-examination, the prosecutor attempted to establish that Kiah had tailored his testimony based upon pre-trial contact with the defendant (Record: 536-544).

In part, the prosecutor cross-examined the defendant concerning his prior felony conviction and various prior bad acts, all of which had been the subject of a pre-trial hearing (Record: 677-687, 691-694), and the fact that he was a trained martial artist who could easily have fended off Ms. Winder (Record: 694, 712-717, 721-722). Notably, during cross-examination the defendant recanted the statements he had made to Detective Giardina concerning his gun, and claimed that he never denied having a gun or stating that the gun was a toy. He also denied providing certain pedigree information to the detective (Record: 707, 709-710). Defendant revealed for the first time on cross-examination that Ms. Winder had slapped him during their first encounter the week before the crime; he testified that he simply forgot to mention that fact previously (Record: 719-720, 726).

Defendant's Accusations of Tailoring

In his opening statement, even over a sustained objection, defense counsel repeatedly told the jury that the evidence would demonstrate that Ms. Winder and Ms. Keegan were lying, and that they had blended the truth in with falsehoods in order to make their lies more effective (Record: 29-33). During the trial, he cross-examined both the complainant and Ms. Keegan about whether they had spoken about the case to one another (Record: 202-203, 276-277, 279-282), and moved to strike Ms. Winder's testimony and preclude Ms. Keegan's based upon apparent contact between them during a break in Ms. Winder's testimony (Record: 204-212 229-230). He opposed reopening an evidentiary hearing on the ground that the prosecutor was "now in a position to tailor whatever subsequent testimony comes to meet the requirements that your Honor has determined. . ." (Record: 130-131). He even requested that a serologist/witness be excused from the courtroom during legal argument concerning the defendant's weapon (Record: 470).

In his summation, he repeatedly referred to the complainant and Ms. Keegan as liars (JA: 6, 8, 10, 18, 19), characterized their testimony as "lies" (JA 9, 24, 28) and as a "script" and as "scripted" (JA: 17), and explicitly argued that Ms. Winder and Ms. Keegan had "talk[ed] it over" before deciding to go to the police and crying rape (JA: 15). He commented that Ms. Winder did not want to "own up" to the fact that she wanted to spend the night with the defendant "because it did not fit her story" (JA: 16). He also asked the jury to compare the victim's testimony with defendant's, and to "consider the reasonableness of the two different stories." Finally, he argued that defendant's description of the events on the day of the crime, was a "more reasonable and natural

extension of the relationship that started the weekend before," and was "consistent" (JA: 12, 14, 18, 21).

The Prosecutor's Response

The prosecutor devoted much of her lengthy summation to the nature and strength of the proof of guilt (JA: 29, 30, 34-36), the facts supportive of the credibility of Ms. Winder and Ms. Keegan (JA: 32-33, 36-37, 39-44), and the defendant's motive (JA: 33-34). She also made a multi-pronged attack on the defendant's credibility relying in part on his interest in the outcome of the case, his felony conviction, his prior bad acts, and his recantation of statements made to Detective Giardina (JA: 31, 44-46, 47-48).

The prosecutor also pointed out that defendant's testimony essentially corroborated that of the prosecution witnesses but for his denial of the crimes, and that "[e]verything else fits perfectly" (JA: 46-47). In part she made this argument based upon the defendant's demeanor on the witness stand, asking the jurors to consider the "smooth slick character you saw here, the one who had an answer for everything" (JA: 45), and then asking them if the manner in which the defendant testified concerning how he fought off Ms. Winder "sound[ed] rehearsed" (JA: 48). In support of this tailoring argument, she referred to how defendant's explanation that Ms. Winder attacked him due to concern about her boyfriend was proffered because it "fits the whole scenario here" (JA: 36-39); and, to how "all of a sudden" on cross-examination the defendant recalled that Ms. Winder had slapped him during their first encounter (JA: 48).

Towards the end of her summation, she then remarked:

> You know, ladies and gentlemen, unlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies . . . . That gives you a big advantage doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence? . . . He's a smart man. I never said he was stupid. He's not accused of being stupid and he wasn't stupid (JA: 49).

The trial court rejected the defense protest that these last comments constituted wrongful comment on defendant's constitutional right to be present at trial (JA: 54), stating that the "fact that the defendant was present and heard all the testimony is something that may fairly be commented on. That has nothing to do with his right to remain silent. That he was the last witness in the case as [sic] a matter of fact" (JA: 54).

The Verdict and Sentence

After deliberating for over three days, the jury returned a verdict convicting defendant of one count of Sodomy in the First Degree (New York Penal Law Section 130.50[1])(anal sodomy), two counts of Criminal Possession of a Weapon in the Third Degree (New York Penal Law Sections 265.02[1], [4]), and one count of Assault in the Second Degree (New York

Penal Law § 120.05) (Record: 1061-1064). It acquitted the defendant of the rape and oral sodomy charges.[3]

The defendant was sentenced as a second felony offender to concurrent indeterminate terms of imprisonment of ten to twenty years on the sodomy count, and three and one-half to seven years on each of the weapon counts.

State Court Proceedings on Appeal

On December 20, 1993, the Appellate Division modified the judgment of conviction by reversing and dismissing one conviction of third-degree weapon possession, and, as modified, unanimously affirmed the judgment. *People v. Agard*, 199 A.D.2d 401, 606 N.Y.S.2d 239 (2d Dept. 1993). In so ruling, the Appellate Division characterized the proof of guilt as "overwhelming," and, in conclusory form, found the contention that the defendant's right to a fair trial had been abridged due to the prosecutor's summation comment regarding defendant's advantage in hearing other witnesses and tailoring his testimony to be without merit.

On April 14, 1994, defendant's application for leave to appeal to the New York Court of Appeals -- in which he raised the same claim -- was denied. *People v. Agard*, 83 N.Y.2d 868, 613 N.Y.S.2d 129 (1994).

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3. Defendant was originally charged in a 36-count indictment with various sex crimes and weapons charges. Eleven were dismissed by the prosecutor and six were dismissed by the trial court before the case was submitted to the jury. The defendant was convicted of three of the remaining nineteen counts. The trial court subsequently dismissed the assault charge on the ground that the jury had acquitted defendant of the underlying assault, which was rape (Record: 1066, 1073).

Federal Court Proceedings

In his June, 1995 petition for a writ of *habeas corpus*, the defendant argued in part that the prosecutor improperly infringed upon his right to be present at trial and to confront his accusers by noting in summation that he had had the opportunity to hear all of the testimony before he testified in his own behalf.

By a decision dated March 15, 1996, the District Court denied the petition (Raggi, U.S.D.J.). The court recognized that it could not "hope on a cold record" to resolve the credibility issue that was before the jury, and that such resolution was not its "task in any event." Then, after noting that the mixed verdict reflected careful deliberation by the jury, the District Court rejected defendant's claim that the prosecutor's summation infringed on defendant's right to be present and confront his accusers under the Sixth and Fourteenth Amendments. While the remarks came "dangerously close to commenting on the exercise of a right," the court concluded that based upon the context in which they were made and the summations of both counsel, it had no doubt that the defendant had failed to demonstrate that he was actually prejudiced by the comments or that the jury was swayed by them.

The United States Court of Appeals for the Second Circuit reversed and remanded the case to the District Court, directing that court to grant the writ unless the state afforded defendant a new trial within sixty days from the date of the mandate. A majority of the panel concluded, over a vigorous dissent, that the prosecutor's summation remark, that insinuated to the jury for the first time on summation that a defendant's presence in the courtroom gave him a unique opportunity to tailor his testimony to match the evidence, violated a criminal defendant's constitutional rights to confrontation, his right to

testify on his own behalf, and his right to receive due process and a fair trial. *See Agard v. Portuondo*, 117 F.3d 696, 709 (2d Cir. 1997).

In so ruling, the Second Circuit relied on this Court's decision in *Griffin v. California*, 380 U.S. 609 (1965), in which this Court held that it is unconstitutional for a prosecutor to suggest to jurors that guilt can be implied from a defendant's decision to exercise his Fifth Amendment right not to testify because such a practice effectively penalizes the defendant for exercising his Fifth Amendment rights. The Second Circuit reasoned that a prosecutor's summation remarks noting the defendant's unique opportunity to be present throughout trial invites the jury to consider the defendant's exercise of his right to confrontation as evidence of guilt, and therefore penalizes him for exercising that right. According to the court, such comments imply that a truthful defendant would have stayed out of the courtroom before testifying or would have testified before other evidence was presented, thereby forcing defendants either to forgo the right to be present, forgo their right to testify last, or risk the jury's suspicion. 117 F.3d at 709.

In upholding what it characterized as a Fifth and Sixth Amendment right to the "opportunity of a defendant to fabricate or conform testimony without comment" (117 F.2d at 710 n.11), the Second Circuit found that a prosecutor wishing to impeach a defendant's credibility had other avenues available, thus rendering the need to impeach based upon the opportunity to fabricate inadequate to overcome a defendant's confrontation rights. 117 F.3d at 711. The court also found it improper to raise the "specter of fabrication" for the first time in summation because such a tactic deprives a defendant and counsel of the opportunity to rehabilitate the defendant's credibility. 117 F.3d at 708 n.6.

In finding a deprivation of the defendant's Fifth Amendment right to testify, the Second Circuit again cited *Griffin v. California*, in holding that the remarks made by the prosecutor had a fatal chilling effect upon that right. In finding a due process violation, the Second Circuit found unredeeming the brevity and isolated nature of the prosecutor's comment. It concluded that a comment that directly disparaged the defendant's exercise of constitutional rights was severe in magnitude, and, in the absence of curative instructions by the trial court and in light of the closeness of the issue of culpability, therefore worthy of reversal. 117 F.3d at 712.

Upon denying the petition for rehearing (again with a vigorous dissent), the majority narrowed the rationale of its earlier ruling, and retreated from any language in the prior decision that suggested that it was constitutional error for a prosecutor to elicit facts tending to show that a defendant tailored his testimony, or to comment on that factual showing. It stated that it was proper to make a factual argument based upon a defendant's testimony -- with its principal focus based upon a comparison of and fit between the defendant's testimony and that of other witnesses -- but that a generic argument that defendant's credibility is less than that of prosecution witnesses solely because he alone attended the entire trial was proscribed comment on the exercise of the right to be present. The court concluded that because the prosecutor in this case ran afoul of this prohibition it was adhering to its prior reversal of the district court decision.

SUMMARY OF ARGUMENT

In *Griffin v. California*, 380 U.S. 609 (1965), this Court ruled that a prosecutor's comment that a defendant's failure to testify should serve as proof of guilt violated the self-

incrimination clause of the Fifth Amendment because it unduly penalized the right to remain silent. The Second Circuit extended that holding, which this Court has stated should be narrowly construed, and ruled that a prosecutor's comments that a defendant tailored his testimony based upon his opportunity as an accused to hear the testimony of other witnesses improperly compromises his Sixth Amendment confrontation right, his Fifth Amendment right to testify, and his due process rights because it forces him to either forgo those rights or have their exercise burdened by such comment. This was error.

This Court has recognized on many occasions that the Constitution does not forbid every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights. Rather, vital to determining the propriety of such an election is an inquiry into the degree to which the constitutional right is impaired and the necessity of the government practice to the maintenance of fairness and reliability in the adversarial process.

Unlike the condemned comments in *Griffin*, comments alerting a jury that a defendant was advantaged as a witness by virtue of his presence in the courtroom during the testimony of other witnesses, and that he perverted that advantage into tailored testimony, are designed to foster the fundamental goal of truth-seeking in the adversarial process. Although a defendant is immune from the witness sequestration rule, he is still subject to the ills created by exposure to other testimony. And once he assumes the witness stand, like other witnesses his credibility may be impeached based upon that fact, particularly when his testimony is tailored. The valued goal of the ascertainment of the truth would be undermined if a defendant

was permitted to present tailored testimony reliant on the prosecutor's disability to challenge his testimony.

Additionally, as opposed to the comments in *Griffin*, such comments do not excessively burden a constitutional right or convert the exercise of a right into proof of guilt. Unlike comments that assume guilt from the failure to testify, the comments at issue here would not lead a juror to conclude that a defendant's exercise of the right to be present at his trial or to testify on the defendant's own behalf was evidence of his guilt. And, while a defendant cannot explain his decision not to testify without giving up the right to remain silent, the defendant here could have sought to counter the inference raised by the prosecutor, but chose not to do so. Rather than forcing a defendant to forgo his confrontation right, such comments merely deprive a defendant of the right to be insulated from suspicion of concocting a defense consistent with the available facts. Also, such comments no more "chill" the exercise of the right to testify than myriad other permissible forms of impeachment; rather than forcing a defendant to forgo the right to testify, they merely force him to engage in tactical decisionmaking.

Equally erroneous was the Second Circuit's finding of a due process violation. The majority assumed a *Griffin* error, but *Griffin* involved a Fifth Amendment, rather than a due process, violation. In any event, the prosecutor's comments were proper and otherwise invited by defense counsel. Certainly, considering their brevity, the proof of guilt (described as "overwhelming" by the State appellate court), and the trial court's instructions, the comments did not infect the trial with unfairness.

Finally, no specific factual references were necessary to permit the comment on defendant's opportunity to hear and make use of the other witnesses' testimony. Like other permissible forms of impeachment, the weight to be given defendant's opportunity and use of that opportunity in assessing his credibility rests with the jury. Moreover, the prosecutor did explain with specific references to testimony and to defendant's demeanor on the witness stand the basis for her argument that the defendant tailored his testimony.

ARGUMENT

THE PROSECUTOR'S COMMENT THAT DEFENDANT HAD AND USED THE UNIQUE OPPORTUNITY TO HEAR THE OTHER WITNESSES AT TRIAL PROMOTED THE RELIABILITY OF THE TRUTH-SEEKING PROCESS AND DID NOT IMPERMISSIBLY BURDEN ANY CONSTITUTIONAL RIGHT OF DEFENDANT.

This Court has repeatedly held that it is permissible to burden the exercise of constitutional rights when the benefit to be achieved is of sufficient magnitude and the impairment of the right is not appreciable. In *Griffin v. California*, the Court struck the balance to preclude comment that transforms the exercise of the right to remain silent into substantive proof of guilt. The Second Circuit's interpretation of *Griffin* to preclude any comment on the exercise of a constitutional right failed to consider this balancing test. Application of this two-prong inquiry to the prosecutor's comments here that defendant had and used to his benefit his unique opportunity to hear the other witnesses reveals that the comments were proper. They advanced the paramount good of the criminal justice system -- the ascertainment of the truth -- and did not impermissibly burden his right to confrontation, his right to testify, or his right to due process.

I. Government Practices That Promote the Integrity of the Truth-Seeking Process Are Authorized Even When They May Discourage The Exercise Of Constitutional Rights.

This Court has recognized on many occasions that the Constitution does not preclude every government-imposed

choice on a defendant in the criminal justice system that has the tendency of discouraging the exercise of constitutional rights. *Jenkins v. Anderson*, 447 U.S. 231, 236 (1980); *Corbitt v. New Jersey*, 439 U.S. 212, 218 (1978); *Chaffin v. Stynchombe*, 412 U.S. 17, 30 (1973). Difficult litigation choices, even those implicating rights of constitutional dimensions, do not necessarily signify constitutional transgressions. *United States v. Dunigan*, 507 U.S. 87, 96 (1993); *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978). Rather, they are an inevitable, permissible and normal incident of criminal proceedings. *See Bordenkircher v. Hayes*, 434 U.S. at 365. Indeed, the criminal process abounds with circumstances in which difficult, and at times even unpleasant, *South Dakota v. Neville*, 459 U.S. 916, 922-923 (1983), decisions must be made. *McGautha v. California*, 402 U.S. 183, 213 (1971); *McMann v. Richardson*, 397 U.S. 759, 769 (1970).

For example, in *Bordenkircher v. Hayes*, this Court held that due process is not violated when a state prosecutor carries out a threat made during plea negotiations to have the accused reindicted on more serious charges if he does not plead guilty, even though this practice undeniably has a discouraging effect on the defendant's assertion of his constitutionally guaranteed trial rights. 434 U.S. at 364-65. Similarly, in *Williams v. Florida*, 399 U.S. 78 (1970), this Court upheld a statute requiring pre-trial disclosure of an alibi defense even though it forced the defendant to choose between his right to remain silent and the right to present a defense. The sometimes "severe" pressure associated with such a choice did not rise to the level of a compulsion to speak.[4] *Id.* at 84.

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4. *See, e.g., United States v. Mezzanatto*, 513 U.S. 196 (1995)(plea waiver agreements upheld); *Town of Newton v. Rumery*, 480 U.S. 386 (1987)(release-dismissal agreements upheld); *United States v. Leon*, 468 U.S. 897 (1984)(permissible to impose choice between right to testify and full expression of Fourth Amendment rights); *Corbitt v. New Jersey*, 439 U.S. 212 (1978)(upholding a statute that imposed higher sentences on defendants who went to trial than on those who entered guilty pleas); *Brady v. United States*, 397 U.S. 742, 752-753 (1970)(plea bargaining upheld even though a guilty plea waives constitutional rights); *McMann v. Richardson*, 397 U.S. 759 (1970)(plea of guilty waived right to contest voluntariness of confession).

In assessing the constitutionality of a government-imposed choice, the crucial inquiry involves a balancing of the legitimacy and necessity of the challenged action against an assessment of whether the policies undergirding the affected constitutional rights are appreciably impaired. *Jenkins v. Anderson*, 447 U.S. at 236; *Chaffin v. Stynchombe*, 412 U.S. at 32; *McGautha v. California*, 402 U.S. at 213. When a governmental practice "needlessly" impairs a constitutional right, it will be struck down. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. Jackson*, 390 U.S. 570 (1968)(guilty pleas needlessly encouraged). Similarly, when governmental conduct is vindictive or has no other objective than to chill the exercise of constitutional rights or coerce their relinquishment, the practice will not be allowed to stand. *Corbitt v. New Jersey*, 439 U.S. 212, 219 n.9 (1978); *North Carolina v. Pierce*, 395 U.S. 711 (1969); *see also United States v. Goodwin*, 457 U.S. 368 (1982).

Conversely, when the benefit of the practice is of sufficient magnitude, then the burden on the constitutional right will be tolerated. In the context of the rights of the accused in the criminal justice system, the most frequently cited benefit justifying the imposition of burdens is the societal interest in the pursuit of truth and fairness in the adversarial process.

For example, while impeachment in its various forms burdens a defendant's right to testify, the interest in enhancing the reliability of the criminal process justifies the imposition of

that burden. *Jenkins v. Anderson*, 447 U.S. at 238, citing *Brown v. United States*, 356 U.S. 148 (1958). The risk of cross-examination may dissuade the exercise of the right to testify, but "it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify." *McGautha v. California*, 402 U.S. at 215; *see Jenkins v. Anderson*, 447 U.S. at 238. The fundamental goal of our legal system and the fundamental purpose of a trial is the determination of truth, *United States v. Havens*, 446 U.S. 620, 626 (1980); *Tehan v. United States*, 382 U.S. 406, 416 (1966), and vital to this is the role of cross-examination of the accused. *Perry v. Leake*, 488 U.S. 272, 282 n.7 (1989). So compelling is this interest that for over a century this Court has remarked that there is "no reason" why a defendant who testifies should be treated any differently than other witnesses. *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1899); *see Brown v. United States*, 356 U.S. 148, 159 (1958); *Reagan v. United States*, 157 U.S. 301, 305 (1895). "Assuming the position of a witness, he [an accused] is entitled to all its rights and protections, and is subject to all its criticisms and burdens." *Reagan v. United States*, 157 U.S. at 305. Thus, in support of this valued societal goal, various methods of impeachment, even those implicating other constitutional rights, are authorized despite their creation of disincentives to testify.[5]

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5. A defendant may be impeached with evidence obtained in violation of his Sixth Amendment rights, *Michigan v. Harvey*, 494 U.S. 344 (1990); *Oregon v. Haas*, 420 U.S. 714 (1975); evidence obtained in violation of his Fourth Amendment rights, *United States v. Leon*, 468 U.S. 897 (1984); evidence obtained in violation of his *Miranda* rights, *Harris v. New York*, 401 U.S. 222 (1971); evidence of prior bad acts, *Old Chief v. United States*, __U.S__, 117 S.Ct. 644 (1997); *Spencer v. State v. Texas*, 385 U.S. 554 (1967); proof of pre-arrest silence, *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980); post-arrest silence in the absence of *Miranda* warnings, *Fletcher v. Weir*, 455 U.S. 603, 606-607 (1982); inconsistent statements, *Jenkins v. Anderson, 447 U.S. at 239*; and,

Indeed, even practices that impose a burden on the accused simply because of his status as a defendant are permitted when they serve the fundamental goal of truth-seeking, despite their purported chilling effect on the right to testify or to mount a defense. For example, because it "is within the province of the court to call the attention of the jury to any matters which legitimately affect his [a defendant's] testimony and his credibility," and because the interest of the defendant in the outcome of the case "is of a character possessed by no other witness," a trial court may routinely instruct the jury, when a defendant testifies, that the defendant's interest in the outcome of the case may be considered in assessing his credibility. *Reagan v. United States*, 157 U.S. 301, 305 (1895); *see United States v. Sullivan*, 919 F.2d 1403, 1419 (10th Cir. 1990); *United States v. Gleason*, 616 F.2d 2, 15-16 (2d Cir. 1980); *Nelson v. United States*, 415 F.2d 483, 487 (5th Cir. 1969); *see also* Modern Federal Jury Instructions 1991, FJC 30-31 (Federal Judicial Center; Matthew Bender).

Nor is the right to testify the only one that may be burdened in the advancement of the truth-seeking function of the trial. Practices that tend to burden the right to be present are authorized when they are necessary to the ascertainment of the truth or the fair and reliable administration of justice. *People v. Buckey*, 424 Mich. 1, 378 N.W. 2d 432, 439 (1985). For example, because of his status as an accused who is present in the courtroom, a defendant may be forced "to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *Schmerber v. California*, 384 U.S. 757, 764 (1966). *See generally* 3 Joseph G. Cook, Constitutional Rights of the Accused, Section 21.3,

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omissions in testimony, *Caminetti v. United States*, 242 U.S. 470 (1916).

pp. 21-11-21-16 (3rd Ed.1996). Also, where justification is shown, the shackling of a defendant will be upheld though it compels an election between exercising the rights of confrontation and presence subject to the prejudice resulting from the jury's observation of the restraint, or forfeiting those rights altogether. *Estelle v. Williams*, 425 U.S. 501 (1976); *Illinois v. Allen*, 397 U.S. 337 (1970).

And practices that tend to pressure a defendant into relinquishing the right to remain silent have withstood attack as forms of constitutional compulsion when they further the truth-seeking function of the trial. For example, a jury may be instructed that a presumption of guilty knowledge may be inferred from a defendant's unexplained possession of contraband. *See, e.g.*, 1 Leonard B. Sand et. al, Modern Federal Jury Instructions, Section 6.02 (1991); 1 Edward J. Devitt et. al, Federal Jury Practice and Instructions, Section 16.10, pp. 591-592 (1992). While a presumption of this kind heightens the incentive to testify and may have the practical effect of compelling a defendant to testify to rebut the presumption, such presumptions have been upheld. *Barnes v. United States*, 412 U.S. 837 (1973); *Yee Hem v. United States*, 268 U.S. 178 (1925); *see County Court of Ulster County, New York v. Allen*, 442 U.S. 140 (1979)(upholding automobile/gun presumption); *see also* 1 Charles E. Torcia, Wharton's Criminal Evidence, Sections 89-150 (13th Ed. 1972)(detailing myriad constitutional presumptions).

Even apparent burdens on the right to counsel may be imposed in order to further the ascertainment of the truth or the fair administration of justice. For example, a defendant may be cross-examined regarding whether he had been coached by counsel during a break in his testimony despite the apparent burden on the right to counsel. *Geders v. United States*, 425

U.S. 80, 89 (1976). Also, a defendant wishing to proceed pro se may be forced to choose between exercising the right to proceed pro se with the unsolicited participation of standby counsel or not exercising the right at all. *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

In applying the balancing test, it is vital to distinguish between an imposition on a constitutional right and a restriction on the defendant's ability to use that right affirmatively to obtain an advantage to which he is not constitutionally entitled.

The constitutional protections are designed to insulate an accused from governmental abuses and overreaching, and not to endow the accused with litigation advantages. The reason is that in order to foster "society's interest in the administration of justice," *Rushen v. Spain*, 464 U.S. 114, 118 (1983), and both fairness and reliability in the ascertainment of guilt and innocence, *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), "it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and the arguments of one another." *United States v. Robinson*, 485 U.S. 25, 33 (1988). "[J]ustice, though due to the accused is due to the accuser also." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

While zealous to safeguard constitutional protections, this Court has been equally vigilante in thwarting efforts by defendants to avail themselves of tactical advantages lacking a constitutional predicate through the guise of an assertion of a constitutional right. For example, whereas it is improper to draw an adverse inference from the assertion of the "constitutional shield" of the Fifth Amendment, *Mitchell v. United States*, __ U.S. __, 119 S.Ct. 1307, 1312 (1999), this Court has restricted the attempt to use that protection as a

"sword" insulated from prosecutorial response when a defendant denies he had an opportunity to explain his actions. *United States v. Robinson*, 485 U.S. 25, 33-34 (1988). Similarly, while a defendant possesses the right to present a defense under the Sixth Amendment, "the Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial process; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *United States v. Nobles*, 422 U.S. 225, 241 (1975).

In the same vein, while a defendant is privileged to testify in his own behalf, he has the obligation to speak truthfully. *Nix v. Whiteside*, 475 U.S. 157, 173 (1986); *Harris v. New York*, 401 U.S. 643, 645 (1971). Consequently, a defendant is proscribed from exercising his Fourth (*Walder v. United States*, 347 U.S. 62 [1954]), Fifth (*United States v. Dunigan*, 507 U.S. 87 [1993]; *Brown v. United States*, 356 U.S. 148, 155-156 [1958]), and Sixth Amendment rights (*Nix v. Whiteside*, 475 U.S. at 173; *Michigan v. Harvey*, 494 U.S. 344, 350-351 [1990]), as well as his *Miranda* rights (*Wainright v. Greenfield*, 474 U.S. 284, 292 n.8 (1986); *Harris v. New York*, 401 U.S. 222 [1971]) as licenses to commit perjury free from the risk of impeachment designed to detect the falsehoods. To rule otherwise would be to transform these protections from "humane safeguard[s]" into "positive invitation[s] to mutilate the truth." *Brown v. United States*, 356 U.S. at 156. Thus, no impairment of a constitutional right occurs when the government practice merely restricts a defendant's attempt to skew the level playing field upon which the issue of culpability is resolved.

This Court applied the balancing test described-above in *Griffin v. California*, to prohibit a prosecutor or a court from

suggesting to a jury that an inference of guilt may be drawn from a defendant's assertion of his Fifth Amendment right to remain silent. This type of comment "cuts down on the privilege by making its assertion costly" and is a "remnant of the 'inquisitorial system of criminal justice'" that subjects the accused to "a penalty imposed for exercising a constitutional privilege." 380 U.S.at 614.

The *Griffin* prohibition recognizes that the ills associated with such comments far outweigh any benefit. First, the policies underlying the Fifth Amendment protection are severely undermined by such comment. The "historic function of the privilege has been to protect a 'natural individual from compulsory incrimination through his own testimony or personal records." *Andersen v. Maryland*, 427 U.S. 463, 470 (1976).[6] Compulsory incrimination offends our sense of fair play and "our preference for an accusatorial rather than an inquisitorial system of criminal justice." *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) .

By asking the jury to infer guilt through a defendant's silence, a prosecutor transforms a silent defendant into a "source of evidence against himself." Albert W. Alschuler, "A Peculiar Privilege In Historical Perspective: The Right to Remain Silent," 94 Mich. L. Rev. 2625, 2627 (Aug.1996). This is because a defendant's failure to testify is "a fact inescapably impressed on the jury's consciousness," *Griffin* at 621, 622, and the "layman's natural first suggestion would probably be that the resort to

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6. *See generally* 8 John T. McNaughton, Wigmore, Evidence in Trials at Common Law, Section 2251 (1961 & Supp.1995); Roderick R. Ingram, "A Clash of Fundamental Rights: Conflicts Between the Fifth and Sixth Amendments in Criminal Trials," 5 Wm. & Mary Bill of Rts. J. 299, 301 (Wint.96); John H. Langbein, "The Historical Origins of the Privilege Against Self-Incrimination at Common Law," 92 Mich. L. Rev. 1047 (March1994).

privilege in each instance is a clear confession of crime." 8 John T. McNaughton, Wigmore Evidence in Trials and Common Law, Section 2272 (1961 & Supp. 1995); *see Lakeside v. Oregon*, 435 U.S. 333, 340 n.10 (1978).

This burden is made weightier by the accused's inability to offset that adverse inference absent total relinquishment of the right to remain silent. Unless the accused takes the stand, his attorney is bereft of admissible evidence upon which to rely in challenging the inference.

Second, such comments do not appreciably advance the truth-seeking process. This Court has recognized that myriad reasons exist unconnected with culpability for declining to testify, and therefore the inference of guilt drawn from the silence is infused with unreliability.[7] Thus, in the absence of a benefit to be derived from the inference, the burden is "needlessly" or unnecessarily imposed, a factor requiring its prohibition. *See United States v. Jackson*, 390 U.S. at 570.

Thus, in *Griffin*, the Court condemned a practice that led to the complete nullification of a constitutional guarantee without any offsetting benefit. The case does not stand for the broad proposition attributed to it by the Second Circuit that any comment on the exercise of a constitutional right is prohibited. Rather, *Griffin*, which this Court has stated should be narrowly construed, *see United States v. Robinson*, 485 U.S. at 31, merely represents an application of the balancing test that must

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7. These reasons include "[e]xcessive timidity" and "nervousness,"*Wilson v. United States*, 149 U.S. 60, 66 (1893), as well as fear of impeachment by prior bad acts and convictions or other harmful information not necessarily relevant to the accusations being tried. *Carter v. Kentucky*, 450 U.S. 288, 300n.15 (1981).

be used in determining the propriety of any burden on the exercise of a constitutional right.[8]

II. The Prosecutor's Comments Properly Furthered The Fundamental Societal Interest In The Determination of Truth.

Application of this Court's balancing test compels the conclusion that the comments in this case were proper.

Quite unlike in *Griffin*, the prosecutor's comments in *Agard* materially advanced the broad fundamental societal interest in the ascertainment of the truth at trial. They alerted the jury to a fact touching directly upon the reliability of the evidence at trial, that being defendant's immunity from the witness-sequestration rule and its concomitant impact on his credibility. *See State v. Hoxie*, 101 N.M. 7, 677 P.2d 620, 622 (1984); *People v. Buckey*, 424 Mich. 1, 378 N.W.2d 432 (1985).

It has been recognized since biblical times that the failure to insulate a witness from other testimony at trial detrimentally

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8. This Court has repeatedly refused to extend *Griffin* to disparate factual scenarios. *See, e.g., United States v. Robinson*, 485 U.S. 25 (1988)(court declined to extend *Griffin* to bar prosecutor's summation comments that were invited by arguments of defense counsel); *Baxter v. Palmigliano*, 425 U.S. 308 (1976)(Court declined to extend *Griffin* to prison disciplinary proceedings); *see also United States v. Francis*, 82 F.3d 77, 79 (4th Cir. 1996)(court declined to extend Griffin to prosecutor's reference in summation to the"uncontradicted evidence"). Indeed, recently one member of this Court described *Griffin* as a "wrong turn" which is "cause enough to resist its extension." *Mitchell v. United States*, __ U.S. __, 119 S.Ct. 1307, 1319 (1999)(Scalia, J. dissenting). The holding has been the source of controversy. *See Office of Legal Policy U.S. Department of Justice, Report to the Attorney General on Adverse Inferences from Silence: Truth In Criminal Justice Report* No. 8 (1989), 22 Mich. J.L. Ref. 1005, 1095 (1989).

affects the witness's reliability. *United States v. Jackson*, 60 F.3d 128, 133 (2d Cir.1995); *United States v. Arias-Santana*, 964 F.2d 1262, 1266 (1st Cir. 1992); 6 James H. Chadbourn, Wigmore, Evidence in Trials at Common Law, Section 1837, p.455 (1974). Hence, the practice was instituted of sequestering witnesses. The reason for this practice is twofold: it "exercises a restraint on witnesses 'tailoring' their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid." As stated by Wigmore, "[i]f the hearing of an opposing witness were permitted, the listening witness could thus ascertain the precise points of difference between their testimonies, and could shape his own testimony to better advantage for his cause." 6 James H. Chadbourn, Wigmore, Evidence in Trials at Common Law, Section 1838, p. 461 (1974). Also, even innocent alterations of testimony are prevented by this rule, for it is recognized that unsequestered witnesses may be influenced subconsciously. 1 John William Strong, McCormick On Evidence Section 50, p. 188 (4th Ed. 1992). The importance of this rule to the integrity of the trial process is so profound that statutory law allows a litigant to demand sequestering as a matter of right, rather than leaving it to the decision of the trial court. F.R.Cr.Pr. 615.

The accused is exempt from this otherwise strict rule in order to give expression to his right to confront the witnesses against him, *Perry v. Leeke*, 488 U.S. 272, 282 (1989), and full effect to his Fifth Amendment right to testify or remain silent. In the latter context, a defendant is permitted to hear the case against him in full in order to determine whether or not his testimony will be necessary or even helpful to his case. *Lakeside v. Oregon*, 435 U.S. 333, 339 n.9 (1978); *Brooks v. Tennessee*, 406 U.S. 605, 610-611 (1972).

The defendant's right to hear the testimony of other witnesses, however, does not render him immune from the possibilities of tailoring or innocent confabulation. Because this fact goes to the heart of his reliability as a witness, the jury should be allowed to consider it. Where a non-defendant witness is exposed to the testimony of another, that fact may be brought to the jury's attention through cross-examination, *United States v. Hobbs*, 31 F.3d 918, 921 (9th Cir.1994); *United States v. Eyster*, 948 F.2d 1196, 1211 (11th Cir.1991), through summation comments, *Holder v. United States*, 150 U.S. 91, 92 (1893); *United States v. Johnson*, 578 F.2d 1352, 1355 (10th Cir.1978), and even through court instruction. *United States v. Cropp*, 127 F.3d 354, 363 (4th Cir.1997); *United States v. Magana*, 127 F.3d 1, 6 (1st Cir. 1997); *United States v. Binetti*, 547 F.2d 265, 269 (5th Cir. 1977); 1 John William Strong, *McCormick On Evidence*, Section 50, p.191 (4th ed. 1992). There is no reason for excepting a defendant from these rules and preventing the jury from considering whether or not the individual who typically is "the most important witness for the defense," *Rock v. Arkansas*, 483 U.S. 44, 52 (1987), has tailored his testimony due to his presence or was influenced by that fact. *State v. Robinson*, 157 N.J. 118, 384 A.2d 569 (1978); *State v. Smith*, 82 Wash.App. 327, 917 P.2d 1108 (1996); *State v. Howard*, 323 N.W.2d 872, 874 (1982); Peter Westen, Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense, 66 Calif. L. Rev. 935, 969 (1978).

Notably, this Court has ruled this way in determining the defendant's rights with regard to a corollary to the sequestration rule that prohibits contact between prospective witnesses and third parties who are aware of testimony already given. As previously noted in *Perry v. Leeke*, 488 U.S. at 272, this Court held that a defendant may be restricted from contact with his

own attorney during a brief (not overnight) recess in his testimony. The reason: when the defendant "assumes the role of a witness, the rules that generally apply to other witnesses -- rules that serve the truth-seeking function of the trial -- are generally applicable to him as well." 488 U.S. at 282-283. This is despite the seeming burden on a defendant's right to counsel. There is no rational distinction between the practice sanctioned in *Perry* and the one advocated by petitioner in this case.

Thus, rather than being "needless" or existing solely to chill the exercise of a constitutional right, prosecutorial comment on the defendant's opportunity to hear and use other testimony promotes the central goal of the criminal justice system, the ascertainment of truth.

III. The Prosecutor's Comments Did Not Deprive Defendant of Any Constitutionally Protected Right Nor Impose An Undue Burden on the Exercise of Any Right.

The prosecutor's comments in this case, unlike those in *Griffin*, did not directly impair any constitutional right of the defendant or render the assertion "costly." Defendant was afforded all the attributes of the right to confront the witnesses against him, to testify in his own behalf, and to a fair trial under the Due Process clause. The comment, in fact, helped advance goals shared by these constitutional provisions. To the extent that defendant faced the prospect that the jury would consider his opportunity to fabricate, that likelihood did not encourage him to surrender his confrontation rights or to refrain from

testifying, nor did it imply to the jury that he was guilty simply because he exercised those rights.[9]

A. The Confrontation Claim

The defendant was provided with the fullness of his rights under the Confrontation Clause notwithstanding the prosecutor's comments. Moreover, at no time did the prosecutor suggest that defendant was guilty simply because he attended his own trial, and unlike in *Griffin*, defendant had ample opportunity to offset the impact of the prosecutor's remarks. Consequently, the Second Circuit's finding of a confrontation right violation was erroneous.

As a threshold matter, defendant was afforded all of the protections that the Confrontation Clause guarantees. The right of confrontation can be traced back to the practices of the ancient Hebrews and Romans and into the sixteenth century.

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9. A number of courts have upheld the practice of referring during cross-examination or summation to a defendant's opportunity to hear other testimony. *See United States v. Warren*, 973 F.2d 1304, 1307 (6th Cir. 1992); *State v. Buggs*, 581 N.W.2d 329 (1998); *State v. Smith*, 82 Wash. App. 327, 917 P.2d 1108 (1996); *Davis v. State*, 221 Ga. App. 131, 470 S.E.2d 520, 522-523 (1996); *State v. Grilli*, 369 N.W.2d 35, 37 (Minn. 1985); *State v. Martin*, 101 N.M. 595, 686 P.2d 937 (1984); *State v. Hoxie*, 101 N.M. 7, 677 P.2d 620, 622 (1984); *Reed v. State*, 633 S.W.2d 664, 666 (Tex.1982); *State v. Howard*, 323 N.W.2d 872, 874 (1982); *State v. Robinson*, 157 N.J. Super. 118, 384 A.2d 569 (1978); *but see State v. Walker*, 972 S.W.2d 623 (Mo.1998); *Commonwealth v. Jones*, 45 Mass. App. 254, 697 N.E.2d 140 (1998); *State v. Cassidy*, 236 Conn. 112, 672 A.2d 899 (1996); *State v. Johnson*, 80 Wash. App. 337, 908 P.2d 900 (1996); *State v. Jones*, 580 A. 2d 161 (Me. 1990); *State v. Hemingway*, 148 Vt. 90, 528 A.2d 746 (1987); *People v. Person*, 400 Mass. 176, 508 N.E. 88 (1987); *Sherrod v. United States*, 478 A.2d 644, 654 (D.C.1984); *Dyson v. United States*, 418 A.2d 127 (D.C.1980).

See Coy v. Iowa, 487 U.S. at 1015-106.[10] An extended period transpired, however, where the right was sharply curtailed, and the practice was implemented of trying defendants solely on the basis of ex parte affidavits or depositions obtained by magistrates, which were merely referred to at the proceeding. *California v. Green*, 399 U.S. 149, 156-157 (1970); *see also White v. Illinois*, 502 U.S. at 359 (Thomas, J. concurring). Even when the procedures evolved to the use of live witnesses, the accused merely attended his own trial in order to observe the witnesses being sworn so that he could challenge on a number of grounds the competency of the witnesses to stand against him. It did not include the right to hear the witnesses while they testified.[11]

This changed with the advent of the Confrontation Clause. Because early American documents rarely mention the confrontation right,[12] and since it was the result of only five minutes debate before its adoption by Congress,[13] scant evidence exists to illumine the intention of the drafters of this

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10. Richard D. Friedman, Confrontation: The Search For Basic Principles, 86 Geo. L.J. 1011, 1022-102 (Feb.1998); Frank R. Hermann, Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause, 34 Va. J. Int'l. L. 481, 482-486 (Spr.94); Daniel Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J. of Public Law 381, 384 (1959).

11. Frank Hermann and Brownlow M. Speer, Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause, 34 Va. Jnl. Int'l. L. 481, 518-522, 540-541 (Spr.1994)

12. Randolph N. Jonakait, The Origins of the Confrontation Clause: An Alternative History, 27 Rutgers L.J. 77 (Fall1995), citing Murl A. Larkin, The Right of Confrontation: What's Next?, 1 Tex. Tech. L. Rev. 67 (1969).

13. Howard W. Gutman, Academic Determinism: The Division of the Bill of Rights, 54 S.Cal. L. Rev. 295, 332-43 (1981), cited in, Robert P. Mosteller, Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions, 1993 U. Ill. L. Rev. 691, 737 (1993).

constitutional safeguard. Hence, it "comes to us on faded parchment." *California v. Green*, 399 U.S. at 174-175 (Harlan, J. concurring). In an evolving process, however, this Court has delineated three essential components of the right of confrontation: (1) having the competent witness testify under oath in order to impress upon him the seriousness of his task and to guard against falsehoods by the possibility of a sanction for perjury; (2) cross-examination, which has been described as the "main and essential purpose of confrontation," *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *Davis v. Alaska*, 415 U.S. 308, 315-316 (1974); and, (3) observation of demeanor by the accused and the trier of fact. *Maryland v. Craig*, 497 U.S. 836 (1990); *Coy v. Iowa*, 487 U.S. at 1017-1018; *California v. Green*, 399 U.S. at 157-158; *Dowdell v. United States*, 221 U.S. 325, 330 (1910). The Confrontation Clause is generally satisfied when these three components are extant. *Ohio v. Roberts*, 448 U.S. 56, 69 (1980); *Maryland v. Craig*, 497 U.S. at 847.

Here, all of the demands of the Confrontation Clause were satisfied. The witnesses all testified under oath; they were subject to cross-examination; and, the jury, defendant and the judge all fully observed their demeanor. Thus, the explicit constitutional guarantee and its defined components were wholly observed. *State v. Robinson*, 157 N.J. Super. 118, 384 A.2d 569 (1978).

The prosecutor's comments merely deprived defendant of what was characterized by the Second Circuit as the "constitutional right to the opportunity to fabricate or conform testimony without comment." *Agard*, 117 F.3d at 710 n.11. Yet there is no such right.

Certainly such a right is not identified within the contours of the Confrontation Clause as delineated by this Court. Moreover, it is not reasonable to suggest that the drafters of the Confrontation Clause, offended by the unfairness of an accused blindly combating ex parte affidavits, meant to swing the pendulum so far as to bestow upon a defendant a litigation boon consisting of the ability to fabricate without challenge. A defendant's presence at trial is meant to give meaning to his right of confrontation and to enable him to decide whether or not to exercise his right to testify. See pp. 27-28, *supra*. It is not designed to enable him to decide what to testify to or what defense to muster "reliant on the prosecutor's disability to challenge his testimony." *Walder v. United States*, 347 U.S. 62, 65 (1953). To rule otherwise would indeed be to transform the confrontation right into a "positive invitation to mutilate the truth." *Brown v. United States, 356 U.S. at 156.*

Thus, the "constitutional right" identified by the Second Circuit should be rejected for what it truly is: the unacceptable ability to "frustrate the truth-seeking function of a trial by presenting tailored defenses insulated from effective challenge." *Doyle v. Ohio*, 426 U.S. 610, 617 n. 7 (1976); *see State v. Smith*, 82 Wash.App. 327, 917 P.2d 1108, 1111-1112 (1996); *People v. Buckey*, 424 Mich. 1, 378 N.W.2d 432 (1985). Deprived merely of this, defendant's confrontation right was not "penalized" at all by the prosecutor's comment and hence the remarks were not constitutionally objectionable. *See South Dakota v. Neville*, 459 U.S. 553, 560 n.10 (1983)(where suspect lacked constitutional right to refuse to take a blood-alcohol test, it was permissible to draw an adverse inference from his refusal to do so); *Williams v. Florida*, 399 U.S. at 78 (upheld right to compel defendant to file pretrial alibi notice on ground that depriving defendant of the "right to surprise the

State with an alibi defense" was not protected by the Fifth Amendment).[14]

In determining that defendant's confrontation right was unduly penalized, the Second Circuit nevertheless found that the prosecutor's comments attached a burden to the exercise of defendant's confrontation right. The court remarked that the prosecutor's comments implied that a truthful defendant would have stayed out of the courtroom before testifying or would have testified before other evidence was presented, and then found a valid comparison to the harmful inference in *Griffin*. The inference to be drawn from the prosecutor's comments here, however, stands in stark contrast to the naturally flowing and pejorative inference of guilt in *Griffin*. *See United States v. Francis*, 82 F.3d 77, 79 (4th Cir.1996); *Resnover v. Pearson*, 965 F.2d 1453, 1465 (7th Cir.1992). The prosecutor did not ask the jurors explicitly or implicitly to infer guilt based upon the defendant's exercise of his confrontation right. Perhaps the analogy to *Griffin* would be more cogent had she stood before the jury and argued that if defendant was innocent he would have not have attended his own trial or have testified in his own behalf. *People v. Buckey*, 378 N.W. 2d at 432. But such direct comment was absent.

Moreover, as the dissent below states, it would "belittle" (117 F.3d at 719) the "sound common sense" of jurors, "the most valuable feature of the jury system," (*Dunlop v. United*

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14. Thus, on the landscape of the law relating to the Confrontation Clause, the Second Circuit has erected the following standard: while a defendant's confrontation right is not necessarily violated where he is denied a face-to-face encounter with his accusers, *see Maryland v. Craig*, 497 U.S. at 836; *Coy v. Iowa*, 487 U.S. at 1012, or even where he is banned from the courtroom altogether, *see Illinois v. Allen, 397 U.S. 337 (1970)*, it is nullified when the prosecutor merely assails the defendant's conversion of the constitutional safeguard into a tactical advantage.

States, 165 U.S. 486, 500 [1897]), to conclude that the jurors inferred from the prosecutor's comments that the only reason the defendant exercised his right to attend his own trial (and testify), was because he was guilty. Jurors expect a defendant to attend his own trial. That this is so is demonstrated by the fact that jurors are instructed against drawing an adverse inference when the defendant is absent from his trial. *See* 1 Comm. On Criminal Jury Instructions of the Office of Court Administration, *Criminal Jury Instructions* New York, Section 4.22 (1st ed. 1983). Similarly, that the adverse inference naturally, and perhaps inevitably, drawn from a failure to testify is greater than the one suggested by the Second Circuit is proven by the need to instruct a jury that they are to draw no inference from a defendant's failure to testify. *Carter v. Kentucky*, 450 U.S. at 288; *Lakeside v. Oregon*, 435 U.S. at 333. No one has ever seriously suggested that an adverse-inference charge is required when a defendant attends his own trial.

Additionally, the defendant had ample opportunities to offset any such inference that the jury might have drawn. Because the order of trial and the power to reopen the case rests within the discretion of the trial court, *Thiede v. Utah Territory*, 159 U.S. 510, 519 (1895); *United States v. Matsushita*, 794 F.2d 46, 51-52 (2d Cir. 1986), defense counsel could have moved to reopen the case after closing argument, *Morris v. Slappy*, 461 U.S. 1, 13 n.5 (1983); after the case had been submitted to the jury, *United States v. Bayer*, 331 U.S. 532, 539 (1947); *Blissett v. Lefevre*, 924 F.2d 434, 439 (2d Cir.1991); and, even after supplemental jury instructions. *United States v. Smith*, 44 F.3d 1259, 1271 (4th Cir. 1995); *see also Goldsby v. United States*, 160 U.S. 70, 74 (1895)(in sound discretion of court to admit rebuttal evidence). But he never moved to do so. This stands in stark contrast to *Griffin*, who

was unable to counter the prosecutor's summation comments without relinquishing his right to remain silent.[15]

Finally, far from impairing the policies underlying the right of confrontation, the comments here furthered a central goal shared by that constitutional provision. The Confrontation Clause was designed to supplant the historic practice of trial by depositions and ex parte affidavits with a system involving live testimony under oath, subject to cross-examination, and with demeanor bared to the watchful eyes of the trier of fact. *Mattox v. United States*, 156 U.S. 237, 242-243 (1895). As this Court has remarked, the primary object of the Confrontation Clause is "the search for truth," *Douglas v. Alabama*, 380 U.S. 415, 418-419 (1965), and its paramount concern the "accuracy of the truth-determining process." *Maryland v. Craig*, 497 U.S. at 846-847 (citation omitted). Cross-examination, as well as the other attributes of the right, are indeed valued so highly precisely because they help insure the accuracy of the result at trial. *White v. Illinois*, 502 U.S. 346, 356-357 (1992); *Lee v. Illinois*, 476 U.S. 530, 540-541 (1986).[16] The prosecutor's comments here, designed to alert the jury's attention to a factor bearing directly on defendant's credibility, served this same end, and, thus, advanced a primary goal of the right allegedly violated.

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15. Considering how he himself sounded the theme of "fabrication" from the outset of the trial, defense counsel could hardly have been surprised by the prosecutor's remarks. Moreover, it is the role of a defense attorney to anticipate what arguments will be made. *See McMann v. Richardson*, 397 U.S. 759, 769-770 (1970).

16. Carolyn M. Nichols, The Interpretation of the Confrontation Clause: Desire to Promote Perceived Societal Benefits and Denial of the Resulting Difficulties Produces Dichotomy in the Law, 26 N.M. L. Rev. 393 (Summer1996); 5 James H. Chadbourne, Wigmore Evidence in Trials at Common Law, Section 1395 (1974).

B. The Right To Testify

Citing *Griffin*, the Second Circuit concluded that the prosecutor's comments inappropriately "chilled" defendant's right to testify because comments of that type compel an accused to either forgo the right or be inappropriately attacked. This facile reliance on *Griffin* was misplaced.

Rather than being "chilled" in any respect, defendant's right to testify was merely subjected to the normal truth-seeking devices that receive constitutional approval. Despite its magnitude, the right to testify is not without limitations, and may "bow to accommodate other legitimate interests in the criminal trial process." *Rock v. Arkansas*, 483 U.S. at 55-56; *see United States v. Scheffer*, 118 S.Ct. 1261, 1264 (1998). As demonstrated above, society's paramount and fundamental goal in obtaining the truth through a rigorous adversarial process is such a legitimate interest, and that interest is served by allowing full impeachment of a defendant's credibility much in the way any other witness' veracity and believability are assailed.

Commenting on a defendant's credibility by arguing that his testimony is tailored based upon his advantage in observing the testimony of the other witnesses is no greater burden on the right to testify than any of the myriad constitutionally sound impeachment tools at a prosecutor's disposal. *See* pp. 18-20, *supra*. If anything, the prosecutor's comments were less burdensome than an interested witness charge considering that the arguments of counsel lack the impact and influence of a court's instructions. *See Carter v. Kentucky*, 450 U.S. 288, 304 (1981); *Taylor v. Kentucky*, 436 U.S. 478, 488-489 (1978). The mere fact that the defendant is compelled to weigh the risk of being accused of tailoring merely implicates a tactical issue

and is no more coercive than his having to calculate the risks involved with these other forms of impeachment.

Also, the weight of the inference to be drawn from the comments herein can hardly be compared to that in *Griffin*. The prosecutor merely argued that the defendant wrongfully conformed his testimony around that of the prosecution witnesses. She never asked the jury to infer guilt based upon defendant's act of testifying in his own behalf; nor did the jury, nor would any jury, do so. The natural assumption of guilt is drawn from a defendant's failure to testify, not the act of testifying. Indeed, *Griffin* was based on that assumption.

Finally, the Second Circuit's conclusion cannot be reconciled with the history of the right to testify. At common law, the accused was not permitted to testify due to the fear that his interest in the outcome, like other parties, "might tend to a perversion of the truth." *Reagan v. United States*, 157 U.S. at 306; *see Rock v. Arkansas*, 483 U.S. at 49-50; *Nix v. Whiteside*, 475 U.S. at 164; *Carter v. Kentucky*, 450 U.S. at 296 n.9. It is doubtful that the drafters of the Constitution, who, in allowing a defendant to testify, tolerated the unreliability born of his interest in the outcome while intending to disable prosecutors from impeaching his reliability based upon his exposure to the testimony.

C. The Due Process Issue

In finding a due process violation, the Second Circuit assumed the existence of a *Griffin*-like error. Rather than engaging in any independent analysis to conclude that the prosecutor committed error, the court simply asserted, "A comment which directly disparages the defendant's exercise of constitutional rights can be severe misconduct regardless of its

length" and compromises "the very fairness of the entire trial." 117 F.3d at 713. However, *Griffin* was not premised on a due process violation; in fact, no such claim was ever raised in *Griffin*. *Griffin*, 380 U.S. at 619 (Stewart, J., dissenting). Thus, the Second Circuit's assumption of error cannot serve as the basis for the conclusion that the defendant's due process rights were violated.

Moreover, even assuming that the prosecutor's comments were objectionable, the comments did not affect the fairness of the trial. The comments were invited by the remarks of defense counsel; the remarks were brief and isolated; the proof of guilt was strong; and, the court gave adequate guidance to the jury concerning the effect to be given the remarks.

Even assuming that error occurred here, not every trial error by a prosecutor results in a denial of constitutional due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 647-648 (1974). It is "not enough that the prosecutors' remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 182 (1986). The only question relevant for review is whether the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643.

Indeed, "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982); *see also Michigan v. Tucker*, 417 U.S. 433, 448 (1974) ("the law does not require that a defendant receive a perfect trial, only a fair one"); *Brown v. United States*, 411 U.S. 223, 231-232 (1973) (same). And "the appropriate standard for review on a writ of habeas corpus is 'the narrow one of due process, and not the broad exercise of supervisory

power." *Darden v. Wainwright*, 477 U.S. at 181, quoting *Donnelly*, 416 U.S. at 642.

Several reasons support the conclusion that the prosecutor's comments did not contaminate defendant's trial. First, the remarks of the prosecutor were invited by defense counsel. Although the invited response doctrine cannot be used to "excuse improper comments," it can be used "to determine their effect on the trial as a whole." *Darden*, 477 U.S. at 182, citing *United States v. Young*, 470 U.S. 1 (1985). Under this doctrine, the defense summation may open the door to an otherwise inadmissible prosecution rebuttal so long as the prosecutor's response, when viewed in the context of the trial and the defense arguments, is a reasonable one. *Young*, 470 U.S. 1, 11-12 (1985); *Lawn v. United States*, 355 U.S. 339, 359 n.15 (1958). Considering the provocation by the defense attorney in this case, the prosecutor's tailoring argument was "invited."

From the outset, defense counsel pressed the claim that the prosecution witnesses had collaborated in fabricating a case against defendant and that Agard's testimony was more credible and consistent than theirs. Throughout the trial he attacked them as liars, characterized their testimony as scripted, and spoke of how Ms. Winder lied because the truth "did not fit her story." Through her claim that defendant had tailored his testimony, the prosecutor was merely "accepting the challenge," *Crumpton v. United States*, 138 U.S. 361, 364 (1891) laid down by defense counsel and attempting to "right the scale." *Young*, 470 U.S. at 14. Considering that the "adversary system permits a prosecutor to 'prosecute with earnestness and vigor,'" *United States v. Young*, 470 U.S. at 7, and the wide latitude given to attorneys in responding to argument, *United States v. Tocco*, 135 F.3d 116, 130 (2d Cir. 1998); *United States v. Coleman*, 7

F.3d 1500, 1506 n.4 (10th Cir. 1993), this response was proper. *United States v. Robinson*, 485 U.S. at 25 (court rejected *Griffin* violation as basis for reversal where remarks were invited).

Second, the proof of guilt was strong, described by the state appellate court as "overwhelming." This minimized the likelihood that the prosecutor's remarks infected the entire trial. Identity was not at issue -- defendant conceded that he had a sexual encounter with the victim. Moreover, the victim's claim of a forced sexual encounter was substantiated by a wealth of independent evidence. The photographs of her taken the day after the crime and weeks later showed the lingering effects of the battering visited upon her by defendant. Medical testimony and records and the testimony of the assigned detective concerning the nature and extent of the victim's injuries further supported the victim's claim that there was a forcible sexual encounter. Also, defendant himself supplied inculpatory evidence that weakened his own claim that the sexual encounter was consensual. This consisted of both his apology to the victim the day after the attack for being a "golden asshole," and his false statements to the assigned detective concerning his possession of the weapon that he used to threaten the victim. In light of this proof, it is unreasonable to assume that the jury would have acquitted defendant of all counts had the prosecutor not made the challenged remarks.

Third, instructions by the trial court also minimized the impact of the prosecutor's remarks. The trial court repeatedly defined "evidence" for the jury (Record: 3-4, 830, 831), instructed the jury that it was only to consider the evidence in rendering a verdict (Record: 826, 827, 843), and emphasized that the arguments of counsel, which the jurors were free to reject, did not constitute evidence (Record: 2, 828, 847).

Additionally, the court incessantly instructed the jurors that they were the sole and exclusive judges of the facts (Record: 825, 828, 830, 831-832, 846-847), and that it was their "recollection, understanding and evaluation of the facts" that controlled regardless of the arguments of counsel or comments of the court (Record: 827). The trial court even interrupted the prosecutor's summation to reiterate this point (Record: 789). These firm instructions adequately alerted the jury to the minimal weight to accord the prosecutor's comments. *See Darden v. Wainright*, 477 U.S. 168 (1986).

This finding is consistent with the "crucial assumption" that juries are presumed to follow their instructions. *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987); *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985); *Parker v. Randolph*, 442 U.S. 62, 73 (1979). Indeed, this Court has presumed "that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Francis v. Franklin*, 471 U.S. at 324 n.9. This rule "is a pragmatic one, rooted less in the absolute certitude the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal process." *Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *see Shannon v. United States*, 512 U.S. 573, 586 (1994). Applying these principles here establishes that, contrary to the Second Circuit's decision, the trial court's final charge sufficiently protected defendant's right to a fair trial.[17]

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17. The fact that these instructions were delivered as part of the final charge to the jury does not lessen their impact. Indeed, without applying the assumption that juries follow instructions to the court's final charge, "it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed. *Parker*

Fourth, it is significant that the defendant merely claims that the single remark at issue here was erroneous. This remark occurred over the course of a ten-day trial that consumed over 1100 pages of transcript. It cannot be said that the "[i]solated passage of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence" was worthy of the issuance of a writ. *Donnelly v. Christoforo,* 416 U.S. at 646.

Finally, it is apparent that the prosecutor's remarks did not cause the jury to wholly reject defendant's testimony. The jury requested that his testimony be read back during deliberations (Record: 969). Moreover, it is evident that the jury carefully scrutinized the evidence; it sent out a total of ten notes requesting readbacks of testimony and instructions on the law over a period of four days. In fact, the trial judge noted that the jury had asked for every item of evidence and for almost all the testimony (Record: 1018). Further, although the jury deliberated on counts of rape, sodomy, and assault, it nevertheless acquitted defendant of all charges but Sodomy in the First Degree and Criminal Possession of a Weapon in the Third Degree. This discriminating verdict demonstrates that the defendant received all he was entitled to -- an impartial jury that carefully examined the charges and evidence against him before returning its verdict.

IV. No Factual Predicate Is Required to Comment on a Defendant's Opportunity to Hear Testimony; Moreover, the Prosecutor Provided a Factual Basis for Her Comments That Defendant Tailored His Testimony.

Upon attempting to narrow the scope of its rule, the Second Circuit stated that the prosecutor's error took the form

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v. Randolph, 442 U.S. at 74.

of failing to establish a factual predicate for the summation argument. The court disparaged the prosecutor's comment on defendant's opportunity to hear the other witnesses, holding that a specific showing of a "fit between the testimony of the defendant and other witnesses" was required. This was error.

At the outset, no factual predicate, other than a showing that the defendant was present during the taking of testimony, is required to comment merely upon a defendant's opportunity to hear other witnesses and the concomitant impact on his credibility. This is because every defendant who is exposed to the testimony of another is susceptible to the ills of innocent confabulation and the temptation to tailor. This is no different than defendants who are unaffected by their interests in the outcome of the case being subjected to an interested witness charge. Just as an interested witness charge may be delivered in every case, leaving the jury to assess the weight to be accorded this motive in the individual case, *Reagan v. United States*, 157 U.S. at 305, a comment on defendant's exposure to other witnesses may be made as a matter of course, leaving the jury to assess the impact of that exposure in the case before it.

Indeed, as the Second Circuit has acknowledged, it is virtually impossible to determine how a person's testimony is affected by having heard other witnesses. As that court has stated, "only with 20/20 hindsight could a party demonstrate what would have been said had a witness been sequestered." *United States v. Jackson*, 60 F.3d 128, 136-137 (2d Cir. 1995). Yet in the context presented here, the Second Circuit requires a prosecutor to possess "20/20 hindsight" as a predicate to making argument on the mere opportunity to hear testimony.

Moreover, the Second Circuit's requirement of a showing of a "fit" between a defendant's testimony and that of

other witnesses as a prerequisite to accusing a defendant of tailoring his testimony ignores the role demeanor plays in a jury's credibility determinations. A defendant's demeanor on the witness stand may alone lead to the conclusion that his testimony is tailored.

Indeed, in this case the prosecutor properly relied on the defendant's demeanor and manner of testifying in support of her argument that his testimony was tailored. *See Reagan v. United States*, 157 U.S. at 305; *Johnson v. United States*, 157 U.S. at 326. She asked the jury to consider the "smooth slick character you saw here" and asked them if the manner in which defendant testified concerning how he fought off Ms. Winder "sound[ed] rehearsed" (JA: 45, 48). Under the standard pronounced by the Second Circuit, however, such demeanor evidence was virtually irrelevant, a conclusion that undermined the role of jurors as factfinders.

Even if more w[illegible]equired, the prosecutor provided it with specific references t[illegible]efendant's testimony. She pointed out that defendant's testimony essentially corroborated that of the prosecution witnesses but for his denial of the crimes, and that "[e]verything else fits perfectly" (JA: 46-47). She also referred to how defendant's explanation that Ms. Winder attacked him due to concern about her boyfriend was proffered because it "fits the whole scenario here" (JA: 37-39). And she directed the jury's attention to the fact that it was only on cross-examination that defendant remembered that Ms. Winder had slapped him during their first encounter (JA: 48). In light of these references, it is difficult to comprehend the Second Circuit's finding that the prosecutor solely relied on defendant's presence at trial to make her tailoring argument and that she failed to support her argument.

Thus, the Second Circuit's conclusion that a writ should be issued based upon the prosecutor's failure to establish a factual predicate for her summation comments was based on an erroneous legal rule and an inaccurate reading of the record.

CONCLUSION

Thus, *Griffin v. California* does not provide any basis for the conclusion that the defendant's constitutional rights were violated. Rather than standing for the broad proposition that a prosecutor may never comment on a defendant's exercise of his constitutional rights, *Griffin* merely represents one case in a spectrum of cases that mandates the implementation of a balancing test in determining the propriety of governmental practices, including prosecutorial comment, that may tend to discourage the exercise of a defendant's constitutional rights. Application of that test to the comments here compels the conclusion that they were proper. Defendant's exposure to the testimony of other witnesses and his use of that opportunity were central to his credibility. Thus, the comments materially advanced the truth-seeking function of the trial without impermissibly burdening defendant's right of confrontation, right to testify, and right to due process.

Respectfully submitted,

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